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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NELSON ZELEDON,

Defendant and Appellant.

H030760

(Santa Clara County

Super. Ct. No. CC595164)

I. INTRODUCTION

In this case, defense counsel hired a psychologist to evaluate defendant and perhaps testify as an expert witness. During discovery, counsel gave a copy of the psychological evaluation to the prosecutor, but, before doing so, he inexplicably failed to redact defendant's statements to the psychologist and thus waived the psychotherapist-patient and attorney-client privileges protecting them. Although later at trial, defendant exercised his Fifth Amendment right against self-incrimination and did not testify, his own words to the psychologist introduced by the prosecutor became the sword that struck a fatal blow to his defense. Providing that weapon to the prosecution could not have been a reasonable trial tactic, and, therefore, we conclude that counsel rendered ineffective assistance that undermines our confidence in the jury's verdict.

II. STATEMENT OF THE CASE

A jury convicted defendant Nelson Zeledon of three counts of aggravated sexual assault—two for rape and one for oral copulation—and one count of sexual penetration of an unconscious victim, all against K., a child under the age of 14 (Counts 1-4); and one count of lewd conduct against S., also a child under the age of 14 (Count 5). (Pen. Code, §§ 269, 261, subd. (a)(2), 288, subd. (a), 289, subd. (d) & 288a.) The court sentenced him to a term of 38 years to life.

On appeal from the judgment, defendant contends the court erred in ruling that he waived the psychotherapist-patient and attorney-client privileges concerning a report by a psychologist retained by the defense and in permitting rebuttal testimony. He also claims defense counsel rendered ineffective assistance in giving the prosecution an unredacted copy of the psychologist's report. Last, defendant claims that he was denied his constitutional right to a unanimous verdict.

We agree that counsel rendered ineffective assistance and reverse the judgment.¹

III. FACTS

The Offenses Against K.

K., who was born in 1991, was 15 years old when she testified. K.'s mother is defendant's cousin, and K. and defendant's daughter S. are about the same age and were close friends. For a while, K. and S. attended a Boys and Girls Club program together after school. When K. was in the seventh grade, defendant would pick them both up, usually between 5:00 and 6:00 p.m., and bring them to his mother's house, where K.'s mother would pick her up later.

¹ In addition to his appeal, defendant filed a petition for a writ of habeas corpus in which he reiterates his claim of ineffective assistance. (H032771, *In re Nelson Zeledon*.) We ordered that the petition be considered with this appeal and shall dispose of it by separate order.

K. testified that at some point, S. quit the program. For a while defendant stopped picking her up. However, after a couple of months, he started again. She said that one time, he picked her up, drove to his home, and brought her to his bedroom. He had her disrobe, kissed her, got on top of her, and had sexual intercourse despite her protests. He then took her back to the Boys and Girls Club around 6:00 p.m., and her mother picked her up sometime between 6:30 and 7:00 p.m. K. testified that this happened four or five times, and the last time, in addition to having forcible sexual intercourse, defendant put his penis in her mouth.²

K. testified that one day, her aunt came to pick her up, but she was not there because defendant had already taken her to his house. Later, when he dropped her off, he told her to make up something about where she had been, and so she said she had been at a 7-Eleven store.

K. explained that she would go with defendant because she did not know what else to do, she did not want to make a scene, and she feared that no one would believe her reason for not wanting to go with him. Similarly, she did not tell her mother because she feared her mother would not believe her.

K. also testified that one night when she was 13, she spent the night with S. at defendant's home, and during the night, while she was asleep, defendant came into the room and put his finger in her vagina, waking her up. She told him to stop and pushed him away. S. did not wake up, and K. never told her what had happened.

K. testified that on April 12, 2005, S. said that she had seen defendant try to kiss K. S., who was angry at defendant for being too strict, advised K. to tell someone. K.

² K.'s testimony at trial concerning how old she was and what grade she was in when and where the incidents occurred, and how many incidents occurred was at times confusing and/or inconsistent and certain details appeared to conflict with what she had told two police officers and the Sexual Assault Response Team (SART) medical examiner and later what she said at the preliminary hearing.

then told S. and S.'s mother about the rapes. S.'s mother told K.'s mother, who then called the police.

Later that day, Sergeant Victor Barnett of the San Jose Police Department briefly spoke to K. and learned generally what had happened. Fellow Sergeant John Robb, who investigated sexual assaults, conducted a longer interview, during which K. recounted the rapes, oral copulation, and digital penetration.

Also that day, defendant was arrested, and Sergeant Robb interviewed him. Sergeant Robb falsely told defendant that his DNA had been found on K.'s underwear. Defendant appeared confused by the revelation and said he had no explanation. However, he denied that he had sexually assaulted K.

Defendant admitted that during a period of unemployment he would pick up the girls after school and take K. to his mother's home. However, after he got a job, he picked up K. only when asked to do so. Defendant denied that he had ever brought her back to his house. He said that once K.'s aunt called to see whether he had picked her up because K. was not at the Boys and Girls Club. He had gotten off work early that day and was at home working on his wife's car. He told K.'s aunt that he had not picked her up and was not sure where she was. K.'s mother called him twice to inquire about whether he had picked her up, telling him that someone said they had seen defendant on the floorboards of his car. Defendant told Sergeant Robb that he later learned that K. had been picked up at a 7-Eleven store.

On April 14, 2005, Mary Ritter, a SART medical examiner at the Santa Clara Valley Medical Center, testified as an expert on child sexual assault and penetrating trauma. She examined K.'s vaginal area for signs of sexual assault. She explained that using a colposcope, which magnifies and photographs the area, she observed a notch on the edge of K.'s hymen. The notch reflected a previous tear that had healed and was indicative of penetrating trauma consistent with sexual abuse.

The Offense Against S.

S. testified that one night, when she was 13, she stayed overnight at K.'s house. S. and defendant were also there. At one point, when the girls were watching a movie in K.'s room, S. went to the kitchen to get something to eat. She turned a light on. Defendant was there and made her turn it off. He had in the past innocently kissed her on the forehead and cheek, but this time, he pulled her to him and tried to kiss her on the lips and put his tongue in her mouth. She told him to stop, pushed him, and walked away to get something to eat. When she passed him, he grabbed her again. She pushed him away, he apologized, and she left. S. then told K. what had happened, and K. told her mother.

K. testified that when S. came back to the room after going to the kitchen, she was scared and shaking. When K. heard what had happened, she was shocked and went to her mother and told her what defendant had done. K.'s mother told him to leave.

The Defense

Douglas Robbins, owner of a medical equipment company in Newark, testified that he hired defendant as a technician around December 15, 2003, and defendant worked continuously until his arrest and then after his release. Based on time records for the period from January 2004 through May 2004, he testified that defendant worked weekdays from 8:00 a.m. until 4:30 p.m. He further testified that depending on the traffic, it can take anywhere from 30 to 90 minutes to get from the company to the freeway exit nearest the Boys and Girls Club. He further testified that technicians drove to work in their own cars, used company vans while working, came back to the company lot, and drove home in their own cars. It was rare for a technician to drive a van home.

Fred McCasland, unit director at the Boys and Girls Club, testified that the after-school program had an open-door policy, and children could come and go on their own. There was a sign-in sheet but no sign-out sheet. He knew defendant because S. attended

the program until sometime in 2004. When both S. and K. attended, defendant would drop them off and sometimes pick them up. He never noticed anything unusual about K.'s demeanor. He said that at one point S. stopped attending, but K. continued. After that, defendant stopped picking up K. Although it was possible that he did, he had no recollection of defendant picking up K. alone. He admitted that he was not always at the front desk.

Doctor James Crawford, Medical Director for the Center for Children Protection at Children's Hospital in Oakland, testified as an expert concerning the examination and detection of children for penetrating trauma due to sexual abuse. He reviewed the allegations of abuse and the medical evaluation of K. by Ms. Ritter, including the colposcopic photographs. He could not tell from the photographs whether the notch identified by Ms. Ritter was deep or superficial, and therefore, it could be either a naturally occurring phenomenon or evidence of penetrating trauma. Thus, he opined that the evidence was insufficient to support a conclusion one way or the other. Given this ambiguity, he would have conducted second examination.³

Rebuttal

The following stipulation was read to the jury: "On or about April 12, 2006, [defendant] made the following statement to his psychologist, Doctor Brian Abbott: [¶] [Defendant] began picking up [S. and K.] in September 2002. Later [S.] stopped going to the after-school program, but he continued to pick up [K.] as a favor to her mother. [Defendant] related that he stopped picking up [K.] after he obtained his most recent employment because the distance from his job to the after-school program prevented him from getting there on time. This happened in December 2003."

³ On direct, Ms. Ritter testified that she had reviewed Doctor Crawford's written report and disagreed with his finding, analysis, and conclusion.

Doctor David Kerns, Medical Director for Child Protection at Santa Clara Valley Medical Center, where Ms. Ritter also worked, reviewed the reports of Ms. Ritter and Doctor Crawford. He disagreed with Doctor Crawford's view that the evidence of penetrating trauma was inconclusive. Rather, having independently reviewed the colposcopic photographs, he agreed with Ms. Ritter that there was evidence of penetrating trauma. He did not think a second examination was necessary.

IV. WAIVER OF PRIVILEGES CONCERNING A PSYCHOLOGIST'S REPORT

Defendant contends that the trial court erred in finding that he waived the psychotherapist-patient and attorney-client privileges concerning a report prepared by Doctor Abbot, a psychologist, retained by the defense. (Evid. Code, §§ 1010-1027, 950-955.)⁴

Background

Prior to trial, the prosecution sought to introduce evidence to show that defendant had a propensity toward sexual conduct with young girls. In particular, the prosecution wanted to introduce evidence that many years earlier, before he and his wife were married, he had had sex with her when she was still a minor. (See § 1108 [evidence of prior sexual misconduct admissible to show propensity].) Presumably to develop rebuttal *Stoll*⁵ evidence—i.e., expert character testimony that defendant does not have deviant sexual interest in young girls—defense counsel retained Doctor Brian Abbot, Ph. D., a psychologist, to evaluate defendant. Doctor Abbot advised defendant about the purposes of the evaluation, evaluated him, and prepared a report, which included a summary of defendant's statements related to charges involving K. Before a hearing on the admissibility of both the proposed propensity evidence and *Stoll* rebuttal evidence,

⁴ All further unspecified statutory references in this section are to the Evidence Code.

⁵ *People v. Stoll* (1989) 49 Cal.3d 1136 (*Stoll*).

defense counsel identified Doctor Abbot as a witness and gave his report to the prosecution as part of discovery. (Pen. Code, § 1054.3 [defense disclosure of witnesses and reports].)⁶

At the in limine hearing, the court opined that the propensity evidence seemed to be more prejudicial than probative and then asked the prosecutor how the defense's intention to introduce *Stoll* evidence might affect his position on the propensity evidence. The prosecutor noted that if the defense called Doctor Abbott, it would open the door to questions concerning defendant's background, including his conduct with his wife when she was a minor. For this reason, the prosecutor doubted that the defense would call Dr. Abbott if the court excluded the propensity evidence. Defense counsel agreed with this analysis and said he was not sure that he would call Doctor Abbott. Thereafter, the court excluded the propensity evidence, warning, however, that if the defense called Doctor Abbott, the prosecution could cross-examine him about defendant's background. Defense counsel then sought a ruling on the admission of the *Stoll* evidence. The prosecutor did not object, and counsel reiterated that he had furnished a copy of Doctor Abbott's report.

Ultimately, defense counsel decided not to call Doctor Abbot. However, the prosecutor announced that he intended to call him to testify about statements in the report by the defendant. Defense counsel objected, claiming that the statements were protected by the attorney-client and psychotherapist-patient privileges and as attorney work-

⁶ Penal Code section 1054.3 provides, "The defendant and his or her attorney shall disclose to the prosecuting attorney: [¶] (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial."

product. In response, the prosecutor noted that Doctor Abbott had informed defendant about the purposes and probable use of the evaluation and the limits of confidentiality before conducting his evaluation. Since defendant knew what the evaluation was for, the prosecutor argued that by disclosing the report, defendant had waived any privileges. Defense counsel countered that the discovery statute had compelled disclosure and argued that under the circumstances, the privileges were not waived and would not be waived unless the defense called Doctor Abbott.

The trial court ruled that by voluntarily providing an unredacted copy of the report, defendant had waived any privileges. The court rejected defense counsel's claim that the discovery statute had compelled disclosure, noting that although the defense must disclose reports of prospective witnesses, Penal Code section 1054.6 allows the defense to withhold any privileged material in those reports.⁷

Discussion

“We review the trial court’s privilege determination under the substantial evidence standard.” (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442.) “ ‘ “When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].” ’ [Citations.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed facts, an appellate court may not overturn the trial court’s decision to reject that claim. [Citation.]” (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 60.)

⁷ Penal Code section 1054.6 provides, in relevant part, “Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product . . . or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.”

The parties agree that because defendant spoke to Doctor Abbot at the direction of defense counsel, his statements during the evaluation were protected by the psychotherapist-patient and attorney-client privileges. (*People v. Clark* (1993) 5 Cal.4th 950, 1005, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; §§ 952, 954, 1012-1027.)

Section 912 provides, in pertinent part, that the right of any person to claim certain privileges, including the attorney-client and psychotherapist-patient privileges, “is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication *or has consented to disclosure made by anyone*. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, *including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege*.” (Italics added.)

Here, defendant was the “holder” of both privileges. (§§ 953, subd. (a) [client is holder]; 1013, subd. (a) [patient is holder].) Thus, the question is whether substantial evidence supports the trial court’s implicit finding that defendant authorized counsel to disclose the report. (See *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 341 [disclosure of privileged material by third party waives privilege where holder authorizes disclosure or gives consent].)

Defendant argues that here, mere disclosure did not establish waiver “because there was no showing that [he] authorized counsel to waive the privilege.”

Defendant cites, and we are aware of, no authority requiring an attorney to have his or her client’s *written* consent or authorization to disclose privileged material. On the contrary, section 912 indicates that a client’s consent or authorization may be inferred from conduct.

Here, defense counsel retained Doctor Abbott to evaluate defendant for the purpose of developing psychological character evidence to rebut the prosecution's effort to show that defendant had a sexual penchant for young girls. Before participating in the evaluation, defendant learned the purposes and probable uses of his evaluation and the limits of confidentiality. Defendant's participation implies that he understood why he was being evaluated, knew that counsel might use the evaluation in his defense, and authorized counsel to do so. (See *Roberts v. Superior Court*, *supra*, 9 Cal.3d at p. 343 [the waiver must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences].)

In accordance with this implication, defense counsel identified Doctor Abbott as a possible witness and disclosed the report. There is no evidence that counsel did so unwittingly or unintentionally or that disclosure was by accident, mistake, or inadvertence. Rather, at the hearing on the prosecutor's motion to admit the propensity evidence, counsel twice informed the court that he had given the prosecution the report during discovery. Counsel did not argue that his disclosure was unauthorized; nor did he suggest that disclosure was somehow qualified, limited, or conditional in any way. Likewise, at the subsequent hearing on whether the defendant had waived his privileges, defense counsel did not suggest that defendant had not authorized him to disclose the report. Counsel argued only that his disclosure did not constitute a waiver.

These circumstances support the trial court's implicit finding that defendant knowingly and voluntarily authorized counsel to disclose the report, a finding that further supports the trial court's conclusion that defendant waived his privileges concerning the contents of the report. (See *Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 187 (*Woods*) [defendant's privilege concerning communications with defense expert waived when expert is identified as witness and a substantial portion of expert's report is disclosed].)

Citing *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 (*State Fund*) and *Rico v. Mitsubishi Motors* (2007) 42 Cal.4th 807 (*Rico*), defendant argues that his privileges were reinstated when counsel promptly rescinded any waiver after deciding not to call Doctor Abbot as a witness.

In *State Fund, supra*, 70 Cal.App.4th 644, the plaintiff's counsel sent the defense several identical boxes of documents during discovery, and in doing so, inadvertently included litigation summaries labeled “ ‘[c]onfidential’ ” and “ ‘[w]ork [p]roduct’ ” with warnings against duplication or circulation. (*Id.* at p. 648.) When counsel discovered the mistake, he demanded the return of the summaries. Defense counsel refused, and the trial court later sanctioned defense counsel for refusing. In upholding the sanctions, the appellate court promulgated a rule to govern the conduct of attorneys who accidentally obtain privileged material through inadvertence. “When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.” (*Id.* at pp. 656-657.)

In *Rico*, the plaintiffs' attorney inadvertently saw defense counsel's notes of an important defense strategy session that defense counsel had brought with him to a deposition. Plaintiffs' counsel immediately perceived their significance and value, knew that defense counsel did not intend to disclose them, and made copies, which were disseminated and later used in deposing defense experts. (*Rico, supra*, 42 Cal.4th at pp.

811-812.) When defense counsel learned that plaintiffs had somehow obtained the document, he demanded the return of all copies and moved to disqualify the plaintiffs' entire legal team. (*Id.* at p. 813.) After a hearing, the trial court found that the plaintiffs' attorney had inadvertently obtained the notes. The court further found that the notes were absolutely privileged work product, and plaintiffs' counsel had acted unethically in examining the notes more closely than was necessary to determine that they were highly confidential, failing to notify defense counsel that he had inadvertently obtained the notes, and surreptitiously using them to gain maximum adversarial value. The court concluded that the violation of the work product rule was prejudicial and disqualified the plaintiffs' entire legal team. (*Id.* at p. 813.)

In upholding the sanction, the California Supreme Court adopted and applied the *State Fund* rule. (*Rico, supra*, 42 Cal.4th at pp. 817-819.) It explained, "The rule supports the work product doctrine [citation], and is consistent with the state's policy to '[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases' and to '[p]revent attorneys from taking undue advantage of their adversary's industry and efforts.' [Citation.] [¶] The *State Fund* rule also addresses the practical problem of inadvertent disclosure in the context of today's reality that document production may involve massive numbers of documents. A contrary holding could severely disrupt the discovery process. As amicus curiae The Product Liability Advisory Council, Inc. argues, 'Even apart from the inadvertent disclosure problem, the party responding to a request for mass production must engage in a laborious, time consuming process. If the document producer is confronted with the additional prospect that any privileged documents inadvertently produced will become fair game for the opposition, the minute screening and re-screening that inevitably would follow not only would add enormously to that burden but

would slow the pace of discovery to a degree sharply at odds with the general goal of expediting litigation.’ ” (*Id.* at pp. 817-818.)

This case is factually distinguishable from both *State Fund* and *Rico*. Defendant’s case did not involve massive discovery of an enormous volume of documents. The prosecutor did not inadvertently obtain a copy of Doctor Abbott’s report without defense counsel’s knowledge or consent. And defense counsel did not unintentionally or mistakenly disclose it to the prosecution. Rather, defense counsel knowingly and intentionally gave the report to the prosecutor with defendant’s implicit authorization and made no effort by redaction under Penal Code section 1054.6 to preserve privileged material.

Moreover, *State Fund* and *Rico* do not suggest that counsel’s disclosure was not a valid waiver of privilege or that counsel can rescind or retract defendant’s otherwise valid waiver and reinstate his privileges if he or she changes trial tactics shortly before trial. *State Fund* and *Rico* hold only that where disclosure of privileged material is not knowing and intentional but inadvertent and mistaken, and counsel makes a timely demand for return of privileged material, the initial disclosure does not constitute a waiver of privilege.

More pertinent here is *Shooker v. Superior Court* (2003) 111 Cal.App.4th 923 (*Shooker*), where the court explained, “The designation of a party as an expert trial witness is not in itself an implied waiver of the party’s attorney-client privilege because his initial status is that of a possible expert witness. If the designation is withdrawn *before* the party discloses a significant part of a privileged communication (as in this case), or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure; *if the party provides privileged documents or testifies as an expert (such as by stating his opinion in a declaration or at a deposition) the privilege is waived.* [Citations.]” (*Id.* at p. 930, italics added.)

Defendant reliance on *Woods*, *supra*, 25 Cal.App.4th 178 is also misplaced. Indeed, *Woods* exemplifies what the *Shooker* court explained. There, defense counsel retained a psychological expert, who administered a variety of tests to the defendant, evaluated the results, and wrote a report, which was then disclosed to the prosecution during discovery. Thereafter, before trial, the prosecution sought discovery of the defendant's actual responses to the various tests, and the trial court ordered disclosure. (*Woods*, *supra*, 25 Cal.App.4th at pp. 181-182.) In affirming, the appellate court held that "while communications with an expert retained to assist in the preparation of a defense may initially be protected by the attorney-client privilege, the privilege is waived where as here the expert is identified, a substantial portion of his otherwise privileged evaluation is disclosed in his report, and the report is released." (*Id.* at p. 187.)

Defendant seeks support for his claim in the following passage: "A defendant who is required to make a pretrial disclosure of the alibi witnesses he intends to call at trial is for all practical purposes in the same shoes as one presenting a mental defense who must turn over his expert's test results before trial: nothing requires the defendant to rely on the defense; no different pressures distinguish the pretrial decision to use the defense from those that are brought to bear at trial; *and nothing penalizes the defendant if he abandons the defense at trial.*" (*Woods*, *supra*, 25 Cal.App.4th 187, italics added.) According to defendant, the italicized statement means that he was entitled to rescind any waiver and reinstate his privileges after he decided not to call Doctor Abbott to testify. We are not persuaded.

The issue of whether a valid waiver of privilege can be rescinded and the privilege reinstated was not before the court in *Woods*, and the court did not address it. Consequently, defendant infers more from the italicized statement than the statement could reasonably mean. Moreover, the *Woods* court went on to reject the theory, advanced there and now here by defendant, that when privileged communications with an

expert witness are disclosed during discovery, the privilege is not waived unless and until that witness testifies. (*Woods, supra*, 25 Cal.App.4th at pp. 187-188.) We agree. Simply put, it is the intentional disclosure of privileged material, not trial tactics, that determines and triggers a waiver. (*Shooker v. Superior Court, supra*, 111 Cal.App.4th at p. 930; *Tennenbaum v. Deloitte & Touche* (9th 1996) 77 F.3d 337, 341 [in determining whether the privilege has been waived, the “triggering event is disclosure, not a promise to disclose”]; *Lohman v. Superior Court* (1978) 81 Cal.App.3d 90, 95 [“the *intent* to disclose does not operate as a waiver, waiver comes into play after a disclosure has been made”].)

We do not, however, intend to suggest that compliance with the discovery statute requires a party to waive privileges concerning confidential communications with an expert witness contained in the expert’s report *before* deciding whether to call that expert at trial. As noted, section 1054.6 allows parties to withhold privileged material during discovery. (See fn. 7, *ante*.) Thus, where, as here, the defense contemplates calling an expert but has not yet decided whether to do so, defense counsel can comply with the discovery statute without waiving any privileges by identifying the expert, disclosing reports prepared by the expert, but redacting any confidential material over which counsel wants to maintain a privilege until a final decision to call the expert is made. (E.g., *Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609 (*Andrade*); *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260 (*Rodriguez*).)

In sum, we conclude that the trial court properly found that defendant waived any privileges concerning Doctor Abbott’s report and its contents.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that if disclosure of the report waived his privileges, then defense counsel rendered ineffective assistance in providing the prosecutor with an unredacted copy.

To obtain reversal due to ineffective assistance, a defendant must first show “that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) Where the record on direct appeal “does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) Because the defendant bears this burden, “[a] reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Second, a defendant must show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

The record on appeal does not reveal why counsel provided an unredacted copy of the report, and the Attorney General suggests that counsel may have done so based on the benefits of presenting *Stoll* evidence. However, we conclude that even though counsel contemplated presenting *Stoll* evidence, it was unreasonable to furnish an unredacted copy of the report, and doing so could not have been the result of a sound tactical decision. Indeed, counsel’s obvious quandary about whether to call Doctor Abbott before and after the court’s ruling on the propensity evidence, his attempt to rescind or retract any waiver and reinstate the privilege after deciding not to call him, and his vigorous efforts to prevent the prosecution from exploiting defendant’s statements in the report

establish that counsel did not, in fact, have a valid reason for furnishing an unredacted copy of the report.

The only possible explanation is counsel's view that the discovery statute forced him to disclose the *entire* report; and, notwithstanding his unqualified disclosure, the confidential information in the report would remain privileged unless and until he called Doctor Abbott as a defense witness. As discussed above, however, both notions are legally untenable. Moreover, case law holds that redaction is the proper and appropriate way to preserve privileges over material contained in reports that must be disclosed during discovery.

In *Rodriguez, supra*, 14 Cal.App.4th 1260, the defense retained a psychological expert to evaluate defendant to see whether he could assert a mental defense. The psychologist prepared a report. Later, the defense identified the expert and disclosed all of the report to the prosecution except for the portion in which the defendant discussed the current charges. (*Id.* at p. 1263.) The prosecution moved to compel discovery of the redacted portion, and the trial court ordered disclosure if the defense intended to call the expert. (*Id.* at pp. 1263-1264.) On appeal, the court held that although designation of an expert triggered the duty to disclose the expert's report, Penal Code section 1054.6 allowed the defense to redact and thereby protect privileged material contained in the report. The court further held that the partial disclosure of the report did not waive the privilege as to the redacted portions. (*Id.* at pp. 1269-1270.)

Under virtually identical circumstances, the court in *Andrade, supra*, 46 Cal.App.4th 1609, citing *Rodriguez*, reached the same conclusion. (*Id.* at pp. 1611-1613.)⁸

⁸ *Rodriguez* and *Andrade* involved pretrial motions to compel. Neither court expressed an opinion concerning whether the privilege would protect the redacted material if the expert testified at trial. (*Rodriguez, supra*, 14 Cal.App.4th at p. 1269, fn. 5; *Andrade, supra*, 46 Cal.App.4th 1614, fn. 3.)

Given Penal Code section 1054.6, *Rodriguez*, and *Andrade*, reasonably competent defense counsel can be expected to know that although experts' reports must be disclosed during discovery, privileged material in them can be redacted and protected. Thus here, defense counsel should have known that he did not have to disclose Doctor Abbott's entire report and thereby waive defendant's privileges as to its contents and could have completely prevented the prosecution from learning about statements damaging to the defense by simply redacting them and then declining to call Doctor Abbott as a witness.

Under the circumstances, we conclude that counsel's failure to redact Doctor Abbott's report demonstrates that his performance "did not meet the standard to be expected of a reasonably competent attorney. . . ." (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.)⁹ Thus, we turn to the issue of prejudice.

In his interview with Sergeant Robb, defendant denied having sex with K. Although K. testified that the sexual assaults usually occurred sometime between 4:00 p.m. and 6:00 p.m., defendant's employer, Mr. Robbins, testified that defendant generally worked until 4:30 p.m. between January 2004 through May 2004—i.e., the period when the alleged sexual offenses took place—and that it takes 30 to 90 minutes to get from the company to the freeway exit nearest the Boys and Girls Club. Moreover, the director at the Boys and Girls Club, Mr. McCasland, testified on direct that after S. quit attending the program, defendant generally did not continue to pick up K., and he had no recollection that he ever did.

⁹ Defendant also claimed that counsel rendered ineffective assistance in failing to claim that the report was protected by the attorney-client privilege and later failing to assert his ineffective assistance on defendant's behalf. As noted, defense counsel asserted the attorney-client privilege concerning the report when the prosecutor decided to call Doctor Abbott as his own witness. Given our conclusion that counsel erred in failing to redact the report, we need not discuss whether he should have fallen on his sword when his efforts to rescind the disclosure and reassert defendant's privileges had failed.

This evidence could have raised a reasonable doubt concerning whether defendant had the time after getting off work to pickup K., take her to his home, commit the unlawful acts, and return to the Boys and Girls Club by 6:00 p.m., and thus, the evidence could have undermined K.'s credibility and testimony, which, as noted, was often vague, hesitant, inconsistent, and contradictory concerning exactly when and where the sexual assaults took place, how many assaults took place, and how old she was when they occurred and partially differed from the statements she had given to the police. Moreover, there was conflicting expert medical testimony concerning whether K. had suffered penetrating trauma in the first place.

Against this backdrop, we note that after the court ruled that defendant had waived his privileges, the prosecution was able to exploit one of defendant's statements to great effect.

After Mr. McCasland testified on direct that defendant stopped picking up K. once S. quit the program, the prosecutor sought to refresh Mr. McCasland's recollection by having him read a statement that defendant had made to Doctor Abbott to the effect that defendant did continue to pick her up as a favor to her mother. The court itself directed Mr. McCasland to read a portion of the report and asked him if it refreshed his memory that defendant continued to pick up K. Mr. McCasland still could not say it did, but he then equivocated, saying that he was not sure and that defendant may have. The prosecutor then asked, "Does the fact that defendant said that he continued to pick up [K.] give you any pause in regards to your statement that he stopped picking her up after [S.] stopped going to the boys and Girls Club?" McCasland said, "I can't really give you an answer on that" The prosecutor continued, "Exactly. And so if the defendant said he did continue to pick up [K.], you could be wrong; is that correct?" McCasland agreed.

Later, the prosecutor said he intended to call Doctor Abbott. To prevent him from testifying, defense counsel reserved his objections and then agreed to the stipulation that defendant had told the psychologist that he continued to pickup K. as a favor to her mother.

In our view, defendant's statement was highly damaging in that it contradicted Mr. McCasland's direct testimony that defendant did not continue to pick up K. and caused Mr. McCasland to equivocate and concede that defendant might have done so. Thus, in effect, the prosecutor was able to bolster K.'s credibility and corroborate her testimony and undermine the defense with defendant's own statement. Moreover, the import and impact of the statement were potentially magnified in the eyes of the jury by the fact that the court itself engaged in the process of refreshing Mr. McCasland's recollection, and the jury learned that defendant made the statement in private to his own psychologist.

Next, we note that during closing argument, the prosecutor emphasized defendant's statement. After defense counsel had argued, he responded, "What we do know is that even after the defense put on that witness to say [defendant] stopped coming to the Boys and Girls Club after this happened—well, and again it was not offered in the defense case, but here was a stipulation—judge read it to you yesterday, and that stipulation is that the defendant went to his therapist and said yeah, I continued to pick her up after my daughter stopped going. [¶] Well, then what was the point of putting on the guy from the Boys and Girls Club? What was the point that if the defense knows that the defendant himself says he continued to pick up [K.]? It is to confuse."

Last, we note that the jury deliberated for three days, and before reaching a verdict, the jury asked to have the stipulation about defendant's statement reread. These circumstances suggest to us that some jurors considered the case close and found defendant's statement particularly pertinent in determining whether he had assaulted K.

In short, the prosecution's evidence against defendant was far from strong; the defense that he did not pick up K. after S. quit the program was credible until the prosecution undermined it with defendant's own statement; the jury considered defendant's statement important to its determination; and the prosecution would not have known about that statement, let alone been able to use it at trial, had counsel redacted it from Doctor Abbott's report.

Under these circumstances, we do find a reasonable probability that at least one juror would have had a reasonable doubt concerning whether defendant sexually assaulted K. In other words, counsel's omission and the subsequent admission of defendant's own statement to rebut his defense undermine our confidence in the jury's verdict on the charges involving K.

We do not reach the same conclusion, however, concerning the one charge of lewd conduct with S. As to that charge, defendant's statement was not relevant, and we fail to see how its admission had any direct and prejudicial impact on the jury's determination. That charge hinged solely on S.'s credibility because she and defendant were the only ones present during the incident. Although K. testified about what happened after the incident when S. returned to K.'s room, K. did not, and could not corroborate S.'s testimony about what had happened. Thus, although the use of defendant's statement may have enhanced K.'s credibility concerning what happened *to her*, the admission of that statement had no direct or indirect tendency to bolster S.'s credibility. Accordingly, we do not find a reasonable probability that the outcome on the charge of lewd conduct with S. would have been more favorable had counsel redacted the report before disclosing it.

VI. OTHER CONTENTIONS

For purposes of guidance on remand, we briefly address some of defendant's other contentions on appeal. (E.g., *People v. Harris* (1994) 9 Cal.4th 407, 431, fn. 14; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1400.)

Unanimity Instruction

Defendant contends that he was denied his right to a unanimous verdict because the court's unanimity instruction was defective.

The court instructed the jury that defendant was charged with aggravated sexual assault "[i]n counts one, two and three sometime during the period of February 24, 2003 and February 24, 2005[.] [T]he People have presented evidence of more than one act to prove that the defendant committed these offenses. [¶] You must not find the defendant guilty unless one, you all agree that the People have proved that the defendant committed *at least one* of these acts and you all agree on which act he committed for each offense, or two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged." (Italics added.)

Defendant argues that the instruction is ambiguous, if not erroneous, because two of the aggravated assault charges involved allegations of rape. Thus, to properly convict him of two counts, the jury had to unanimously agree that he committed at least two of the acts of rape shown by the evidence, not just one; and they also had to agree on which ones they were.

We find no reasonable likelihood that jurors thought they could convict defendant of two counts based on a unanimous agreement that he committed only one rape. Rather, the court's instruction reasonably informed jurors that they had to agree that defendant committed at least one act and agree on which act he committed "for each offense."

In a retrial, however, defense counsel may properly ask the court to clarify this issue, and counsel may address it during closing argument to ensure a proper understanding.

Defendant argues that the court should not have instructed jurors on the second option—i.e., unanimous agreement that defendant committed all of the acts shown by the evidence during the specified time period and at least the number of offenses charged. He argues that because K. testified so inconsistently concerning the number of rapes and when and where they occurred, it was impossible for the jury to determine that he committed all of the acts she described. Defendant also argues that the court should have elected between the two options and not instructed on both options, leaving it to the jury which alternative to use.

In *People v. Jones* (1990) 51 Cal.3d 294, the court explained, “In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, *in addition* to allowing a conviction if the jurors unanimously agree on specific acts, *also* allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.” (*Id.* at pp. 321-322, italics added.)

Jones authorizes the court to instruct the jury on both options in appropriate cases. Thus, it was not error.

Finally, defendant notes that the unanimity instruction permitted the jury to convict him if it found that the offenses were committed during the period of February 24, 2003, and *February 24, 2005*. He notes, however, that K. turned 14 on February 24, 2005. Thus, technically the unanimity instruction impermissibly allowed a

conviction based on acts that defendant committed when K. was 14 and not when she was “under the age of 14” as required by Penal Code section 269 [aggravated sexual assault] and as alleged in each count.

Again, at a retrial, defense counsel can object to any such technical inaccuracy and conflict between the elements of the offense and the period of time described in the unanimity instruction, if it persists, and seek to have it corrected.¹⁰

Rebuttal Evidence

Defendant claims that the court erred in permitting Doctor Kerns to testify as a rebuttal witness concerning Doctor Crawford’s assessment of the colposcopic evidence and disagreement with Ms. Ritter that it showed penetrating trauma.

Penal Code section 1093 establishes the order in which a trial shall proceed: The prosecution presents its case-in-chief, the defense presents its case (*id.*, subd. (c)), and then the parties may “respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.” (*Id.*, subd. (d).)

Our Supreme Court has summarized the rules regarding proper rebuttal evidence as follows: “ ‘If evidence is directly probative of the crimes charged and can be introduced at the time of the case in chief, it should be.’ [Citation.] ‘[P]roper rebuttal evidence does not include a material part of the case in the prosecution’s possession that tends to establish the defendant’s commission of the crime. It is restricted to evidence made necessary by the defendant’s case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.’ [Citation.] [¶] The

¹⁰ In a related claim, defendant argues that the prosecutor was guilty of misconduct in that he allegedly argued that unanimity was not required. Defendant waived this claim because he failed to object. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.) And even if defendant had preserved the issue for appeal, reversal renders it unnecessary for us to address this claim.

reasons for the restrictions on rebuttal evidence are ‘to (1) ensure the orderly presentation of evidence so that the trier of fact is not confused; (2) to prevent the prosecution from “unduly magnifying certain evidence by dramatically introducing it late in the trial;” and (3) to avoid “unfair surprise” to the defendant from sudden confrontation with an additional piece of crucial evidence.’ [Citations.] [¶] “ ‘The decision to admit rebuttal evidence over an objection of untimeliness rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.’ [Citation.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 761; *People v. Young* (2005) 34 Cal.4th 1149, 1199; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1232; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1211; *People v. Thompson* (1980) 27 Cal.3d 303, 330; *People v. Carter* (1957) 48 Cal.2d 737, 753-754.)

“Numerous cases have approved the introduction of rebuttal evidence where, as in the case at bench, rebuttal testimony repeats or fortifies a part of the prosecution’s case in chief which has been attacked by defense evidence.” (*People v. Graham* (1978) 83 Cal.App.3d 736, 741, disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 569; accord, *People v. Young*, *supra*, 34 Cal.4th at p. 1199; see *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 68 [“that the evidence in question might have tended to support the prosecution’s case in chief does not make it improper rebuttal”]; *People v. Warner* (1969) 270 Cal.App.2d 900, 906 [same].)

Here, Ms. Ritter opined that K. had suffered a penetrating trauma to her hymen and based that opinion on her observations of K.’s hymen and the colposcopic photographic evidence. She said she had read Doctor Crawford’s analysis and disagreed with his view that only a complete notch in the hymen shows penetrating trauma. Thereafter, Doctor Crawford testified that the colposcopic evidence did not provide enough information to support an opinion concerning whether K. had suffered penetrating trauma. The court then permitted Doctor Kerns to testify in rebuttal, that

having reviewed the photographic evidence, he agreed with Ms. Ritter and disagreed with Doctor Crawford and opined that the photographic evidence supported a finding of penetrating trauma. Although Doctor Kerns's repeated and fortified Ms. Ritter's testimony and disagreement with Doctor Crawford's report, it nevertheless specifically rebutted Doctor Crawford's testimony concerning the sufficiency of the photographic evidence.

We do not find that Doctor Kerns's testimony in this regard had a tendency to confuse the jury. Nor did he unduly emphasize the importance of certain evidence at the end of the trial. Finally, Doctor Kerns's testimony did not unfairly surprise the defense, which knew that Doctor Kerns had participated in the analysis of photographic evidence and had signed off on Ms. Ritter's report.

VII. DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for purposes of retrial of the charges related to the acts against K. (Counts 1-4), if the prosecution elects to retry defendant on those charges. If it elects not to do so, then the court is directed to resentence defendant on the conviction based on the offense against S. (Count 5) and enter a new judgment.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.